In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-335

DAVID L. HALPENNY AND OTA T. THOMAS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the evidence of their guilt was insufficient and that certain evidence was improperly admitted, that the government's closing argument was improper, and that the trial court erroneously refused to allow petitioners' attorney to interview the jury after the trial.

Following a jury trial in the United States District Court for the Eastern District of Tennessee, petitioners were convicted of conspiring to make, possess and use destructive devices, in violation of 18 U.S.C. 371 and 844 and 26 U.S.C. 5861 and 5871. Petitioner Thomas was also convicted of attempted destruction of property with a destructive device, in violation of 18

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U.S.C. 2 and 844.[1] Petitioner Halpenny was sentenced to four years' imprisonment. Petitioner Thomas was sentenced to concurrent terms of four years' imprisonment on the conspiracy count and six years' imprisonment on the attempt count. The court of appeals affirmed (Pet. A–8 to A–10).

The evidence at trial showed that from approximately April 7, 1971, through August 31, 1971, striking members of Local 515 of the Teamsters Union manned picket lines at the showroom of the Amos & Andy Buick Company in Chattanooga, Tennessee (Tr. 15–16). During this time, petitioner Halpenny, president of Local 515, conducted negotiations on behalf of the union with the management of Amos & Andy (Tr. 16). In April 1971, petitioner Thomas and another of Local 515's business agents told Jack Rawlings that "something had to be done about the strike" at Amos & Andy and that he should "get Sydney Dickson to throw a bomb down there."[2] Thomas also told Rawlings where to find some dynamite (Tr. 37–39). Dickson and Rawlings made a bomb and, early in the morning of April 13, 1971, placed it by the side door of the automobile dealership. Although the device failed to detonate, Rawlings

[1] Petitioner Thomas was acquitted on a third count charging destruction of property with a destructive device. Petitioner Halpenny was tried for conspiracy only. Co-defendants James Gallahan, Francina Gallahan and Robert Smith were tried with petitioners and convicted of conspiracy and related substantive offenses. Unindicted co-conspirators Jack Rawlings and Sydney Dickson testified for the government under grants of immunity.

[2] Dickson and Rawlings were members of the Teamsters Union but were not employees of Amos & Andy (Tr. 35, 207–209).

and Dickson were paid fifty dollars for the attempt by petitioner Thomas (Tr. 40–41, 210–211, 215).

In June 1971, petitioner Halpenny told Dickson that the strike at Amos & Andy was still not going well and that something further would have to be done (Tr. 220–221, 329). At about the same time, petitioner Thomas instructed Rawlings to "blow the place up" (Tr. 44). Rawlings thereupon had Dickson make another bomb, which Rawlings threw through the front window of the Amos & Andy showroom on the night of June 13, 1971 (Tr. 17, 45). The bomb exploded, causing substantial damage to the building and to display cars (Tr. 18).

A day or two later, Rawlings told Dickson that payment for the bombing would be made by petitioner Halpenny (Tr. 223). Subsequently, Rawlings and his girl friend drove to the union hall, and petitioner Halpenny paid Rawlings $250 for the successful bombing. Halpenny informed Rawlings at that time that if the June 13 bombing did not produce a settlement ending the strike, the next bombing would be worth $500 (Tr. 47, 360–361).[3]

[3] Rawlings and his girl friend both testified that immediately before the meeting with Halpenny they had met Thomas at a doughnut shop. Thomas had told Rawlings at that time that he should go to the union hall and that he would be paid there for the bombing by petitioner Halpenny (Tr. 46, 358–359). They further testified that their meetings with Thomas and Halpenny had taken place a few days after the successful bombing on June 13, 1971 (Tr. 46, 383). A physician testified, however, that Thomas was hospitalized for intestinal surgery from June 6, 1971, until June 30, 1971 (Tr. 669). In his closing argument, the prosecutor suggested that the government's witnesses had been honestly mistaken about the dates of the meetings (Tr. 861).

1. Petitioners challenge the evidence introduced by the government at trial on several grounds: (a) they object to an asserted lack of corroboration of the testimony of the government's witnesses, who they allege had a motive to frame them, and criticize the government for failure to refute their alibis; (b) they accuse the government of knowingly using perjured testimony; (c) they attack the method by which hearsay statements of co-conspirators were introduced; and, finally, (d) petitioner Halpenny contends that there was no evidence of his participation in the conspiracy.

a. Petitioners' contentions (Pet. 23–26) concerning an asserted absence of corroboration of the testimony of the government's witnesses constitutes nothing more than a challenge to the credibility of those witnesses. The government's witnesses were subjected to extensive cross-examination, and the judge instructed the jury that the government must prove its case beyond a reasonable doubt (Tr. 970–972). As indicated by the brief discussion above, there was ample evidence at trial from which the jury could have found petitioners guilty as charged. Petitioners have no cause to complain because the jury apparently chose to believe the government's witnesses.[4]

b. The record does not support petitioners' contention (Pet. 20–23) that one or more of the government's witnesses committed perjury at trial, or

[4] Petitioner Thomas' alibi for the bombing attempted on April 13 needed no refutation, since it did not cover the material events that had occurred in the early morning on that date (Tr. 40–41).

that the government knowingly permitted perjured testimony to go uncorrected. Although there were some inconsistencies in the testimony of the government's witnesses, nothing in the record supports petitioners' allegations that those inconsistencies were the result of willful lying rather than faulty memories.

c. Petitioners' contention (Pet. 32–33) that it is the duty of the court to decide *in camera* whether statements of co-conspirators are in furtherance of a conspiracy is without merit. The trial court properly submitted that issue to the jury. See, *e.g.*, *United States* v. *King*, 472 F. 2d 1, 9 (C.A. 9), certiorari denied *sub nom. Butler* v. *United States*, 414 U.S. 864.

d. Petitioner Halpenny argues (Pet. 29–32) that there was no evidence of his participation in the conspiracy charged in the indictment and that his payment for the bombing that occurred on June 13, 1971, could not be used to prove that he was a part of the conspiracy, since the payment was made after the conspiracy had ended. But even if it were assumed that the conspiracy terminated with the successful bombing, Halpenny's payment was admissible to prove his participation in the conspiracy. See *Anderson* v. *United States*, 417 U.S. 211, 218–219; *Lutwak* v. *United States*, 344 U.S. 605, 617–618. Halpenny's argument that the payment was necessarily related to the substantive offense rather than the conspiracy overlooks the fact that the same evidence may be relevant to two separate crimes. *Nye & Nissen* v. *United States*, 336 U.S. 613, 619; *United States* v. *McGowan*, 423 F. 2d 413, 415–417 (C.A. 4).

2. Petitioners' contention (Pet. 33) that the government's closing argument, to which no objections were raised prior to return of the verdicts, was improper is also without merit.

The most important issue in the case was the credibility of the government's witnesses. In his argument, the prosecutor acknowledged that the government's witnesses were not of unblemished character, but he argued that their testimony in this case was credible. Words chosen to make this argument (see Pet. 6–7, 33), such as "[w]e are standing behind what these people said from this witness stand in this trial" (Tr. 852), when taken out of context, belie the true nature of the argument when read as a whole. The government did not personally guarantee the veracity of the testimony against the defendants or rely upon facts not in evidence at the trial,[5] but argued that the testimony was worthy of belief. For example, immediately following the statement quoted above, the prosecutor stated: "We are standing behind that and we contend what they told us was the truth" (Tr. 852). In any event, moreover, the jury was clearly instructed by the court that it was the sole judge of the weight and credibility of the testimony of each witness (Tr. 965–967).

[5] Petitioner Halpenny further contends (Pet. 6–7) that, in stating in his closing argument that there were some discrepancies between the testimony presented to the grand jury and that presented at trial, the prosecutor improperly relied upon facts not in evidence at the trial. But petitioner has failed to suggest how he could have been prejudiced by the government's pointing out a weakness in its case, and we have been unable to perceive a basis for assuming such prejudice.

Petitioner Halpenny also objects (Pet. 7) to the prosecutor's statement during his closing argument that Halpenny had arranged bombings in addition to those specifically charged in the indictment (Tr. 929). Throughout the trial, witnesses testified about such other bombings. The court instructed the jury to consider such bombings only as they might reflect on matters charged in the indictment (*e.g.*, Tr. 48, 49).[6] The prosecutor's theory of the case was that Halpenny had ordered the bombings in question in order to advance the interests of the union and that they revealed Halpenny's intent and *modus operandi* (*e.g.*, Tr. 851, 858, 919–921). Since Halpenny paid for one bombing and stated that the next bombing would be worth more, and since the business agents of the union who had told Rawlings and Dickson what to bomb had been hired by petitioner Halpenny, the statement in question constituted a permissible inference from the evidence establishing the existence of the conspiracy.

3. Petitioners also contend (Pet. 26–28) that the trial court erred in refusing their counsel's request to interview the jurors after the trial, especially concerning publicity that had appeared during the trial.

The court carefully and repeatedly instructed members of the jury not to read or listen to news accounts

[6] The court's instructions in this regard were correct. The other bombings were admissible to prove the defendants' intent and *modus operandi*. See, *e.g.*, *Sears* v. *United States*, 490 F. 2d 150, 152 (C.A. 8), certiorari denied, 417 U.S. 949; *United States* v. *Pennick*, 500 F. 2d 184, 187 (C.A. 10), certiorari denied, 419 U.S. 1051.

of the case (Tr. 202, 470, 581, 937). Before submission of the case to the jury, the court carefully questioned the jurors and received no indication that the court's instructions in this regard had not been followed (Tr. 980–981). In their motion to interview jurors after the trial, petitioners merely alleged that juror misconduct was likely and not remote. Since petitioners offered no specific evidence of misconduct on the part of individual jurors, the court's refusal to permit post-verdict interviews was proper in light of the public's interest in preventing post-trial harassment of jurors. See *United States* v. *Franks,* 511 F.2d 25, 38 (C.A. 6), certiorari denied, No. 74–1281, June 23, 1975; *United States* v. *Dye,* 508 F.2d 1226, 1232 (C.A. 6), certiorari denied, 420 U.S. 974.

Petitioners also attack (Pet. 27–28) the rule in effect in the United States District Court for the Eastern District of Tennessee permitting counsel to interview jurors after the trial only after having obtained the consent of the presiding judge.[7] They argue that such rule is defective because only this Court has rule-making authority. However, 28 U.S.C. 2071 grants all courts established by Congress power to prescribe rules for the conduct of their business. See also Rule 57(a), Fed. R. Crim. P. Furthermore, district courts have a responsibility to protect the integrity of the judicial process by guarding against jury tamper-

[7] Petitioners' suggestion (Pet. 4) that the court framed and announced the rule in the case is incorrect; the rule in question has been in effect, in written form, in the Eastern District of Tennessee since 1969 (Pet. A–33—A–34).

ing, the inhibition of jury deliberations, and jury harassment (see *Miller* v. *United States*, 403 F. 2d 77, 81–82 (C.A. 2)); the rule challenged by petitioners appropriately serves those interests while giving presiding judges the discretion to permit post-verdict interviews of individual jurors whenever justified in individual cases.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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